MOTION FILED
MAY 13 1988

(5)

No. 87-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

—v.—

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANT

Geoffrey M. Kalmus*
Harold P. Weinberger
Joel B. Zweibel
KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for the Official Committee of Unsecured Creditors of Public Service Company of New Hampshire

* *Counsel of Record*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Official Committee of Unsecured Creditors (the "Unsecured Creditors' Committee") of Public Service Company of New Hampshire ("PSNH"), appointed on February 10, 1988 in the bankruptcy reorganization proceeding of PSNH, respectfully moves for leave to file the annexed brief *amicus curiae* in support of the Jurisdictional Statement of Appellant PSNH. The attorneys for PSNH and appellee the State of New Hampshire have consented to the filing of the brief; the consents of the attorneys for the other appellees, the Consumer Advocate and the Campaign for Ratepayers' Rights, were requested and denied.

This appeal involves an attempt by a state legislature to restrict a rate-making authority from setting utility rates in the manner prescribed by this Court. The statute at issue precludes

consideration of the cost or value of generating facilities which have been built but which are not in service even where, as here, the facility is inoperative only because licensing has not yet been obtained and the failure to include these assets in the rate base has catastrophic financial consequences.

The Unsecured Creditors' Committee was appointed to represent all of the unsecured creditors of PSNH, including trade creditors and institutional and individual debt holders. At present its members represent some $900 million in unsecured debt. The Unsecured Creditors Committee requests leave to submit this brief *amicus curiae* because the issue before this Court is one of national significance and because resolution of the issue in this case will have a significant impact on the ability of the unsecured creditors to realize on their claims in the PSNH reorganization case.

Respectfully submitted,

Geoffrey M. Kalmus*
Harold P. Weinberger
Joel B. Zweibel
KRAMER, LEVIN, NESSEN, KAMIN
& FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for the Official Committee of Unsecured Creditors of Public Service Company of New Hampshire

* *Counsel of Record*

May 16, 1988

QUESTION PRESENTED

Do New Hampshire Rev. Stat. Ann. § 378:30-a and the New Hampshire Supreme Court's application of that statute to deny utility investors any recovery of or on investment in a generating plant which is fully constructed but not yet in service, effect a taking of property in violation of the Fifth and Fourteenth Amendments when the result is (1) to prohibit the state ratemaking agency from determining whether the appropriate balance between investor and consumer interests requires such recovery and (2) to bring about the bankruptcy of the utility?

PARTIES TO THE PROCEEDING

The petitioner below was Public Service Company of New Hampshire. The State of New Hampshire was the respondent below. The Consumer Advocate, Michael W. Holmes, and the Campaign for Ratepayers' Rights were intervenors in the New Hampshire Supreme Court.

Rule 28.1 Listing

Amicus, The Official Committee of Unsecured Creditors of Public Service Company of New Hampshire, is an official committee appointed on February 10, 1988 in the reorganization of Public Service Company of New Hampshire under Chapter 11 of the Bankruptcy Code. The Official Committee of Unsecured Creditors has no parent company, subsidiaries or affiliates. Its members and *ex officio* member are as follows:

Equitable Capital Management Corp.
Hemphill Power & Light Co.
IBJ Schroder Bank & Trust Company
Integon Life Insurance Corporation
Midlantic National Bank
New Hampshire Hydro Association
United Engineers & Constructors, Inc.
State Street Bank and Trust Co. (*ex officio* member)

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BRIEF AMICUS CURIAE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANT

INTEREST OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AS AMICUS

The Official Committee of Unsecured Creditors (the "Unsecured Creditors' Committee" or the "Committee") of Public Service Company of New Hampshire ("PSNH") was appointed on February 10, 1988 to represent all unsecured creditors of PSNH in connection with a voluntary petition for reorganization filed by PSNH on January 28, 1988 under Chapter 11 of the Bankruptcy Code. The Unsecured Creditors' Committee represents the owners of the entire spectrum of unsecured debt, including trade creditors, debenture holders and indenture trustees. Committee members in the latter two

categories consist of or represent institutional investors such as pension and trust funds, as well as individual investors. The total amount of unsecured debt presently represented by members of the Unsecured Creditors' Committee is approximately $900 million.

In the decision from which this appeal is taken, the Supreme Court of New Hampshire held that New Hampshire Rev. Stat. Ann. § 378:30-a (1984), the so-called "anti-CWIP" statute, precluded the New Hampshire Public Utilities Commission (the "PUC") from granting PSNH an emergency rate increase, even though PSNH was on the brink of financial collapse. The court rejected PSNH's contention that, by erecting an absolute barrier to the PUC's consideration of all matters relevant to PSNH's financial condition, the New Hampshire Legislature had run afoul of this Court's mandate that utility rates be "just and reasonable." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

The bankruptcy petition filed by PSNH was the inevitable and immediate result of the failure of the PUC to grant the requested emergency rate increase. Although it is now too late to avoid these consequences, the Unsecured Creditors' Committee supports the position of PSNH on this appeal because the Committee believes that a review of PSNH's emergency rate increase application without the strictures of the anti-CWIP statute would result in significant increased revenue to PSNH. From the perspective of the unsecured creditors, this infusion of income could mean a substantial difference between a successful reorganization and one in which unsecured debt may be materially and adversely affected.

STATEMENT OF THE CASE

The Unsecured Creditors' Committee adopts the full Statement of the Case in the brief filed by PSNH. The principal factual points contained in PSNH's brief are these:

1. PSNH undertook construction of the Seabrook Nuclear Generating Station in 1974, with the full support of the PUC.

The planning and construction of this project was no doubt the product of the widely prevalent belief in the early 1970's that demand for electricity would soar and that, in view of the Arab oil embargo, nuclear plants would be less expensive to build and operate than alternate energy sources. *See* Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity*, 132 U. Pa. L. Rev. 497, 500-02 (1984).

2. Construction of the Seabrook project was approved at various stages by the Federal Nuclear Regulatory Commission and supported by the New Hampshire Legislature. Although Unit One of Seabrook Station was completed in October 1986, it has not been placed into service, primarily because of opposition of anti-nuclear groups.

3. As of July, 1987, PSNH, which owns 35.6 per cent of Seabrook, had invested approximately $2 billion in the project, which amounts to some 69 per cent of its assets. Since 1979, PSNH has been unable to include any of this amount in its rate base. In that year, the New Hampshire Legislature enacted the so-called anti-CWIP statute, which provides that rates for utilities "shall not in any manner be based on the cost of construction work in progress" and that such costs "shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers."

4. In the spring of 1987, after years of difficulty raising capital, PSNH found itself unable to market an issue of its notes. As part of a plan to enable its continued survival, PSNH sought an emergency rate increase from the PUC. Although the PUC did not dispute PSNH's position that the company would not be able to meet its obligations without an emergency rate increase, the PUC found that the only way in which it could grant the application was to take into account the value or cost of the Seabrook facility, which it was prohibited from doing under the anti-CWIP statute.

5. The PUC certified to the Supreme Court of New Hampshire the legal question whether, in light of these facts, PSNH

was entitled to a hearing "to establish a level of rates to restore its financial integrity consistent with the interests of customers . . . notwithstanding the so-called anti-CWIP statute." The Court found that a hearing was not required and that the anti-CWIP statute could constitutionally be applied to the facts presented here. On remand, the PUC denied PSNH's application for an emergency rate increase and dismissed the petition.

ARGUMENT

In *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), this Court held that to satisfy constitutional requirements, utility rates must be set at a "just and reasonable" level, which in turn requires a "balancing of the investor and the consumer interests." *Id.* at 603. From the investors' perspective, the rates established must provide sufficient revenue for operating and capital costs, a return which is "sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital." *Id.*

The decision from which this appeal is taken ignored those principles. Instead, the state court reached the conclusion that a legislative body is entitled to handcuff a rate-making authority by preventing it from considering in any manner the value or cost of assets not yet placed in service, even where the result is a bankruptcy proceeding, the ultimate loss of financial integrity. This appeal thus clearly presents a substantial constitutional question. Indeed, unless the judgment of the New Hampshire Legislature is allowed to supersede the constitutional pronouncements of this Court, a reversal on the merits should surely result.

The Development of the Constitutional Standard of "Just and Reasonable" Rates

More than one hundred years ago, this Court described the "regulatory compact" governing the fixing of utility rates. *The Railroad Commission Cases*, 116 U.S. 307, 343-45 (1886) (dissenting opinion). Investors in regulated utilities yield the power to reap free market profits and agree to provide service to all

customers; in return, they are guaranteed a reasonable rate of return.

Prior to this Court's decision in *Hope*, the courts, following the lead of this Court in *Smyth v. Ames*, 169 U.S. 466 (1898), focused their review of rate-making decisions on whether or not the rate-making authorities had correctly established the "fair value" of the assets of the company. As a corollary to that principle, the courts only permitted assets to be included in the utility's rate base if they were "used and useful," that is, actually servicing the utility's customers. *See* discussion in *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987).

In *Hope*, this Court construed statutory provisions relating to natural gas which, in themselves are not directly relevant here. But the Court's decision was not merely an exercise in statutory interpretation. Because prior decisions had equated the statutory standard with that mandated by the Constitution, the decision in *Hope* "defines the point at which a rate becomes unconstitutionally confiscatory as well." *Jersey Central*, 810 F.2d at 1175.

In *Hope*, the utility claimed that the rate-making authority, the Federal Power Commission, erred in using original rather than replacement cost of its assets in computing the rate base. The Court found that the method employed by the rate-making authority in assessing the fair value of the utility's assets was irrelevant. In marked departure from the prior analysis, the Court held that what was required was that the end result be, in the words of the statute, "just and reasonable." The fixing of "just and reasonable" rates, according to the Court, required "a balancing of the investor and the consumer interests." 320 U.S. at 603. Speaking through Justice Douglas, the Court articulated the factors to be considered in evaluating the investors' interests this way:

> [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for oper-

> ating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Id. (citations omitted).

This change in the nature of the judicial inquiry—eliminating the focus on methodology and replacing it with a concern for the end result—also impacted on the concept of including only "used and useful" assets in the rate base. As explained in the *Jersey Central* case, "with the demise of 'fair value,' 'used and useful' ceased to have any constitutional significance . . . . It is now simply one of several permissible tools of ratemaking, one that need not be, and is not, employed in every instance." 810 F.2d at 1175 (citations omitted).

The principles set forth in the *Hope* case have been followed by this Court in subsequent opinions. For example, in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Court held that compliance with constitutional requirements required the courts to consider "whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." *Id.* at 792.

The PUC's Order and the New Hampshire Court's Decision Clearly Fail to Comport with the *Hope* Standard

In this case, as recited in the opinion of the New Hampshire Supreme Court, the PUC found that it was "unlikely that PSNH would be in a position to meet its cash obligations as they became due: namely, interest and principal payments on

debts, expansion of service to customers, and fuel expenses, payroll, and other related expenses." The PUC also found, as expressed by the New Hampshire court, that "financial markets are unwilling to provide additional new funds for PSNH due to investor perceptions of high risk." (4a-5a).[1]

The PUC found that the only other available source of funds, and the only "realistic alternative" (5a) was obtaining additional cash through a rate increase. Specifically, the PUC found that "PSNH needs additional revenues from a rate increase in order to meet its cash obligations" (6a), which as a practical matter is the minimum level of financial integrity of any business organization.

In short, the rate-making authority in this case determined that proper consideration of investor interests, as defined in the *Hope* case, required consideration of the merits of PSNH's application for an emergency rate increase. But no such analysis was undertaken because the basis for the request related to the costs associated with Seabrook Unit One and the court had advised the PUC that no such costs could be taken into account.[2] Thus, the PUC rejected the rate increase application without even engaging in the process of balancing investor and consumer interests, as mandated by this Court in *Hope*.

The issue thus squarely presents itself: Is the policy making judgment of a state legislature in enacting a nonconstitutionally mandated *per se* rule against including certain assets in a utility's rate base to be allowed precedence over this Court's articulation of the balancing process that must be undertaken to avoid imposition of constitutionally infirm confiscatory rates?

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1 References are to pages of the opinion annexed as Appendix A to PSNH's Jurisdictional Statement.

2 The court suggested that investors had already been compensated for the risk that no return would ever be permitted on nearly 70 per cent of the company's assets. For the reasons stated by PSNH, the Court's position is without basis. PSNH Jurisdictional Statement at pp. 20-25.

That this issue is one which raises a substantial constitutional question is scarcely debatable.[3]

The New Hampshire Anti-CWIP Statute Is Unconstitutional

The Unsecured Creditors' Committee believes that when the Court reaches the substantial question raised by this appeal, it will hold the New Hampshire anti-CWIP statute unconstitutional. The analysis employed in the majority opinion of the D.C. Circuit in *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987) is directly on point, completely persuasive and, if accepted, determinative of the issues raised on this appeal.

In *Jersey Central*, the utility sought rate increases from the Federal Energy Regulatory Commission (the "Commission") based on inclusion in rate base of a portion of the costs of constructing the Forked River nuclear power plant, a facility that had been cancelled by the utility before it was completed. The Commission had summarily dismissed the application without affording a hearing on the ground that prior Commission precedent precluded consideration of any costs for assets not placed into actual service. In a concession that would be dispositive here, but was not in *Jersey Central*, the Commission contended that the court could only set aside a rate order under *Hope* "if the [rate] order would put the utility into bankruptcy." *Id.* at 1175.

After reviewing this Court's decisions, the court found that the Commission had misstated the law and that the Commission's *per se* exclusion of the cost or value of the cancelled nuclear facility violated the principle established in *Hope*. The

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3 Given this Court's recent notation of probable jurisdiction in *Duquesne Light Co. v. Barasch*, 108 S. Ct. 1105 (1988), a similar result in this case would appear to be an *a fortiori* conclusion. In *Duquesne*, the record before the Court does not suggest that Pennsylvania's anti-CWIP statute placed the utilities in financial jeopardy. It is thus conceivable, though not urged by the Committee, that the Court in *Duquesne* could decide that Pennsylvania's anti-CWIP statute is not unconstitutional on its face, though the New Hampshire statute challenged here is invalid as applied to a utility, such as PSNH, on the verge of insolvency.

court noted that *Hope* requires a balancing of investor interests "in maintaining access to capital markets, the ability to pay dividends, and general financial integrity." Noting that "companies about to go bankrupt would certainly see such interests threatened," the court found that "companies less imminently imperiled will sometimes be able to make that claim as well." *Id.* at 1180.

The court held that, in achieving a proper balance between those investor interests, on the one hand, and the consumer interest in the non-imposition of exploitative rates, on the other, a rate-making agency must analyze all relevant factors, including the cost of prudent investments not placed into service.[4] A rule which precludes consideration of these components without regard to the financial consequences of such a refusal—whether imposed by an agency's prior precedent or by state statute—cannot be squared with the rule established by this Court in *Hope*:

> The central point, however, is this: it is impossible for us to say at this juncture whether including the unamortized portion of Forked River in the rate base would exploit consumers *in this case*, or whether its exclusion, *on the facts of this case*, constitutes confiscation, for no findings of fact have been made concerning the consequences of the rate order. . . . Jersey Central has presented allegations which, if true, suggest that the rate order almost certainly does not meet the requirements of *Hope Natural Gas*, for the company has been shut off from long-term capital, is wholly dependent for short-term capital on a revolving credit arrangement that can be cancelled at any time, and has been unable to pay dividends for four years.

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4 In this case, there has been no decision as to whether or not the costs of Seabrook Unit One were prudently incurred, since the anti-CWIP statute precluded the PUC from ever reaching that question. Although the Unsecured Creditors' Committee believes that the investment will be shown to have been prudent when made and fully supported by legislative and regulatory authorities in New Hampshire, the issue is simply not before the Court on this appeal.

Jersey Central, 810 F.2d at 1181 (emphasis in original) (footnote omitted).

All of this applies with even greater force here, where the facility sought to be included has been completed, not cancelled and where the condition which the Commission conceded would justify judicial intervention in *Jersey Central*—the bankruptcy of the utility—has in fact occurred.

CONCLUSION

The constitutional question presented by this appeal is a substantial one; indeed, when the merits are reached, the Court is likely to reverse the decision of the New Hampshire Supreme Court. The Official Committee of Unsecured Creditors of Public Service of New Hampshire respectfully requests that this Court note probable jurisdiction of this appeal.

Geoffrey M. Kalmus*
Harold P. Weinberger
Joel B. Zweibel
KRAMER, LEVIN, NESSEN, KAMIN
& FRANKEL
919 Third Avenue
New York, New York 10022
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Attorneys for the Official Committee of Unsecured Creditors of Public Service Company of New Hampshire

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